take appropriate action. These are circumstances when personal safety, the safety of others, civil liability, potential employment-related discipline, criminal charges and adverse actions affecting careers are at stake. Police officers must have clear and consistent case law directing them in this area. It is necessary for this Court to hear this matter and direct officers on the legality of deadly force when third parties are present.

II. The Eighth Circuit decision creates a circuit split on the constitutional issue of deadly force when a third party is in close proximity.

Excessive force claims are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). In evaluating excessive force claims, "the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier v. Katz,* 533 U.S. 194, 205 (2001). The "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. at 396.

The Eighth Circuit erred in determining Officer Lee's actions were unreasonable based on the risk of harm to a third party. This decision creates new constitutional law that conflicts with the Fourth Circuit and will lead to confusing results within and beyond the Eighth Circuit. This new law will affect police officers by denying the discretion to use lethal force upon a suspect when a third party is in close proximity. This decision will expose officers and the public to increased danger. The Eighth Circuit relied on *Tennessee v. Garner,* 471 U.S. 1 (1985) in its decision; however, when applying the facts of this case the court reasoned, "[a] trained shooter, such as Lee, would have known that under the circumstances the shot would hit both men, including the one

man that Lee had to presume was a victim rather than a suspect." *Craighead v. Lee,* 399 F.3d 954, 961 (8th Cir. 2005). The court considered the risk of harm to a third party (in this case the presumed victim). *Garner* does not rely on, nor mention, risk of harm to another. Instead, the instructions of this Court focus on "the intrusion on the *individual's Fourth Amendment interests.*" *Garner,* 471 U.S. at 8 (emphasis added) (citing *United States v. Place,* 462 U.S. 696, 703 (1983)); see also *Graham v. Connor,* 490 U.S. 396. Reliance on *Garner* for considering the risk of harm to a third party is thus misplaced.

The Fourth Circuit has directly addressed the risk of harm to a third party in an excessive force case. The risk of harm to a third party as applied in this case conflicts with the Fourth Circuit. In *Howerton v. Fletcher,* 213 F.3d 171 (4th Cir. 2000), officers shot a subject armed with a knife after believing he was attempting to attack a woman. *Id.* at 172. The Fourth Circuit explained in deciding whether an officer acted reasonably: "the question is whether the officer acted reasonably *against the plaintiff.*" *Id.* at 173. "[T]o recognize the risk posed to third parties by the official use of force as a component of the excessive force inquiry would be, in effect (though admittedly not in fact) to afford the section 1983 plaintiff standing to seek and obtain relief for the unreasonable use of force against third parties." *Id.* The court found the risk posed to third parties by the official use of force is not to be considered in determining whether use of force was excessive against a particular plaintiff. *Id.* at 175. The court upheld the finding of reasonableness of the officers' actions. *Id.* at 171.

The Eighth Circuit's decision conflicts with the Fourth Circuit and creates dangerous precedent. Based on these two circuit decisions, an officer in the Eighth Circuit must stop in a highly volatile situation and consider the risk of harm to a third party before using lethal force on a suspect. This hesitation and fear of possible litigation will cause officers to

lose vital time in a critical situation. However, officers in the Fourth Circuit are not faced with the burden of balancing the harm to a third party or facing a lawsuit based on harm to a third party. The Eighth Circuit holding gives suspects greater rights than third parties enjoy. An injured third party's section 1983 action is analyzed under the Fourteenth Amendment. *Howerton,* 213 F.3d at 173.

The standard under the Fourteenth Amendment is whether the officers acted with reckless or callous indifference to the individual's rights. *Landol-Rivera v. Cruz Cosme,* 906 F. 2d 791, 796 (1st Cir. 1990). The standard under the Fourteenth Amendment is much higher than the inquiry under the Fourth Amendment which is one of "objectivable reasonableness." *Graham v. Connor,* 490 U.S. 386, 388 (1989). Therefore, a felon in the Eighth Circuit can support a claim his/her Fourth Amendment rights were violated because the officer(s) used unreasonable force concerning a third party in situations where the third party could make no viable claim the officer violated his/her Fourteenth Amendment rights. The holdings between the two circuits[2] are inconsistent and it is necessary for this Court to

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[2] *Moreland v. Las Vegas Metropolitan Police Department,* 159 F.3d 365 (9th Cir. 1998). Decedent's mother and children brought forth § 1983 claim alleging police officers shot the wrong man after responding to a gunfight. The Court granted summary judgment for the officers and the Circuit Court affirmed. The Court determined the *Lewis* "intent to harm" standard applied given the facts of the case. *See County of Sacramento v. Lewis,* 523 U.S. 833 (1998). The Court found the officers were required to "act decisively" in the situation. Nearly 50-100 people were essentially trapped in the parking lot where the gunfight was occurring, some in the middle of the gunfire. Additionally, the police called for them to stop shooting, but the men failed to comply. Under these facts, the Court found the *Lewis* standard was appropriate, noting it was possibly more appropriate here than under the facts of *Lewis.*

hear this matter and advise the lower courts regarding excessive force and third parties. Certainly the passenger in a vehicle being pursued by the police is on the same plane as the driver and only has a right to a 14th amendment claim "in a high-speed automobile chase aimed at apprehending a suspected offender ... only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation." *Lewis,* 523 U.S. at 836.

Furthermore, circuit courts have applied *Lewis* to innocent bystanders. *See Medeiros v. O'Connell*, 150 F.3d 164, 170 (2nd Cir. 1998) (*Lewis* shocks the conscience standard applies to lawsuit brought by mother of teenage hostage who was killed during an attempt to capture the hostage taker); *Davis v. Township of Hillside*, 190 F.3d 167, 170-71 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000) (*Lewis* intent to harm standard applies to claim brought by innocent bystander); *Claybrook v. Birchwell*, 199 F.3d 350, 360-61 (6th Cir. 1999) (*Lewis* shocks the conscience standard applies to claim brought by innocent bystander injured during an exchange of gunfire); *Schaefer v. Goch*, 153 F.3d 793, 798 (7th Cir. 1998) (*Lewis* intent to harm standard applies to claim brought by parents of innocent bystander killed during a standoff with a suspect); *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir. 1998) (*Lewis* shocks the conscience standard applies to "cases where it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others."); *Onossian v. Block*, 175 F.3d 1169, 1171-72 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999) (applying shocks the conscience standard to claim brought by innocent motorist struck by fleeing suspect); *Torres v. Bonilla*, 185 F.3d 869 (9th Cir. 1999) (unpublished) (applying intent-to-harm standard to claim brought by innocent bystander injured by fleeing suspect), *cert. denied*, 120 S.Ct. 498 (1999); *Childress*

v. City of Arapaho, 210 F.3d 1154, 1157-58 (10th Cir. 1998) (recognizing *Lewis* principles apply "whether the claimant is a police suspect or an innocent victim.").

This Eighth Circuit decision will cause police officers to analyze and second guess their split-second decisions in hostile and potentially dangerous situations to consider any potential danger to those in the area and weigh the risk of using lethal force. This deliberation will seriously infringe on the necessary split-second decisions of officers in highly volatile situations and increase the risk of harm to the officer and others. If the officer must stop and weigh each risk, the officer loses essential time in controlling every situation. During this time people may be injured or killed.

As the cases cited in this and Petitioner's brief indicate, it is not uncommon for law enforcement to encounter a situation involving an armed suspect in a volatile situation. It is necessary for this Court to hear this case and direct whether the risk of harm to third parties should be applied in analyzing excessive force against a particular section 1983 plaintiff.[3] This Court should resolve the split among the circuit courts. This split denies police officers fair warning whether deadly force may be justified in circumstances similar to those faced by Officer Lee.

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[3] This Court's holdings are consistent with not analyzing the risk of harm to third person in section 1983 cases. See *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (holding a defendant cannot assert the Fourth Amendment's protection against unreasonable searches unless his own reasonable expectation of privacy was violated, regardless of whether the search at issue violated some third person's reasonable expectation of privacy).

III. The Eighth Circuit departed from the precedent of "objectively reasonable."

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 397 (1989). In *Saucier,* this Court stated:

> Because police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene....
>
> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is

> reasonable, however, the officer is entitled to the immunity defense.

Saucier v. Katz, 533 U.S. 194, 205 (2001) (citation omitted). Despite this clear standard, the Eighth Circuit concluded in *Craighead,* Officer Lee deliberately "aimed his shotgun at the two men wrestling, and fired without warning." *Craighead,* 399 F.3d at 961. This is a conclusion drawn by Craighead's experts, whose opinions reflect their theory of Officer Lee's subjective state of mind. *Id.* at 960.

This subjective assessment of Officer Lee's state of mind is contrary to *Graham* and *Saucier.* This Court's review of this case is necessary to clarify the objective reasonableness standard used in excessive force cases is based on the officers' perspective at the time of the incident and not on experts reviewing the case for litigation.

IV. The Eighth Circuit decision improperly evaluated whether Craighead's rights were clearly established.

Whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). In *Brosseau v. Haugen,* 125 S.Ct. 596 (2004), this Court stated:

> There is no doubt that *Graham v. Connor,* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* [*v. Creighton*], 'that the right the official is alleged to have violated must have been 'clearly established' in a more particularized,

> and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Brosseau, 125 S.Ct. at 599 (2004) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "To be 'clearly established,' the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Turner v. Arkansas Ins. Dept.*, 297 F.3d 751, 755 (8th Cir. 2002) (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

A. In deciding whether a right is clearly established, the Eighth Circuit's reliance on general principles in this case does not provide fair warning in extremely difficult circumstances.

The Eighth Circuit incorrectly relied on general principles. Here, the court conceded, "[n]either party has cited a case with facts substantially similar to those we are required to assume on this appeal, nor have we found one." *Craighead*, 399 F.3d at 962. However, the court went on to determine cases that were not substantially similar to this case, "put the officers on notice before December 3, 2001, that they may not use deadly force under circumstances in which they should know that the suspect does not present an immediate threat of serious physical injury or harm." *Id.* at 963.

The *Craighead* panel relied on five cases in its analysis. Each case can be easily distinguished from the case at hand. In *Ribbey v. Cox*, 222 F.3d 1040 (8th Cir. 2000), qualified immunity was denied where an officer shot in the back and killed an unarmed passenger seated in a vehicle surrounded by police. The court stated *Ribbey* is "readily

distinguishable from cases in which the officer actually observed the decedent with a weapon." *Id.* at 1043. In *McCaslin v. Wilkins,* 183 F.3d 775 (8th Cir. 1999), the weapon of the suspect was a motor vehicle. Qualified immunity was denied because a fact dispute existed as to whether the vehicle was disabled and facing the officers at the time they shot the suspect. *Id.* at 779. In *Woolfolk v. Smith,* 81 F.3d 741 (8th Cir. 1996), Woolfolk began hitting the officer in the head with a plastic trash lid and was shot and killed by the officer. The court denied qualified immunity because it found issues of fact regarding whether Woolfolk was a fleeing felony suspect, whether he knew the officer was a police officer, whether Woolfolk was harming the officer or there was a threat of harm to others and whether the officer acted reasonably in encountering Woolfolk. *Id.* at 743. In *Ludwig v. Anderson,* 54 F.3d 465 (8th Cir. 1995), qualified immunity was denied where an officer shot an emotionally disturbed man, armed with a knife, in the back because a question of fact existed as to whether officers departed from a police department policy that circumscribed the use of force on mentally ill individuals. *Id.* at 474. In *Gardner v. Buerger,* 82 F.3d 248 (8th Cir. 1996), the court denied qualified immunity where there was no dispute a deputy shot an unarmed man in the back of the head. *Id.* at 254.[4]

None of the cases cited by the Eighth Circuit demonstrate Officer Lee violated a clearly established right. The court used these cases to apply general principles of qualified immunity. None of these cases address the seriousness of the threat Officer Lee faced. In four of these cases (*Ribbey, McCaslin, Woolfolk* and *Gardner*), there was no threat of a weapon. In the fifth, *Ludwig,* the suspect was

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[4] The court also relies on *Wilson v. City of Des Moines,* 293 F.3d 447 (8th Cir. 2002) which was decided seven months after the incident in this case. This Court in *Brosseau v. Haugen,* 125 S.Ct. 596, 600, n. 4 (2004) determined cases post-dating the incident could not provide fair warning to an officer.

armed with a knife running away. None of these cases involve suspects with a gun. Here, Officer Lee was aware the suspect (whom he believed was Craighead) had already shot two men, possessed a large caliber gun, the gun was in his hand, he was involved in a struggle with an unarmed man, and there were innocent bystanders in the immediate vicinity. Thus, the court relied on general principles in its qualified immunity decision.

This court should grant review to insist the Eighth Circuit Court of Appeals adhere to its precedents that a violation of a clearly established right must be sufficiently clear and not based on mere general principles. See *Kuha v. Minnetonka,* 365 F.3d 590, 602 (8th Cir. 2003).

B. The *Craighead* panel departed from precedent in deciding Craighead's constitutional rights were clearly established.

Acknowledging it was a difficult question, the *Craighead* panel based its "clearly established decision" Officer Lee could not shoot in this situation on three factors: (1) Mr. Craighead did not pose a significant threat to Officer Lee because the gun was over Craighead's head; (2) a warning was feasible; and (3) Officer Lee knew or should have known that he would hit both Craighead and Scott, so he could not have fired to protect Scott. *Craighead,* 399 F.3d at 962.

First, it is not clearly established that a gun must be pointed at an officer (or victim) for an officer to use deadly force. The Eighth Circuit for the purposes of summary judgment found Officer Pomeroy could see Parks' hand was not on Officer Gottstein's gun. In finding Pomeroy did not violate a clearly established constitutional right the court stated: "we cannot say that, at the moment of Parks's fatal shooting, Pomeroy reasonably should have known that what he was doing violated Parks's constitutional rights. In the

present case, even if we assume that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks's hand." *Parks v. Pomeroy,* 387 F.3d 949, 957 (8th Cir. 2004).

Here, the Eighth Circuit should not have departed from its precedent in *Parks*. The court found Mr. Craighead did not pose a significant threat at the time Lee fired the shotgun because the pistol was continuously over Craighead's head, pointed upward. Even though the pistol was over Craighead's head, he *did* pose a serious threat to Scott and others. Officer Lee was not on notice what he did violated a constitutional right. In *Parks*, the officer could see the suspect's hand was not on the officer's gun but was entitled to qualified immunity for shooting Pomeroy because the law was not clearly established. In the present case, a reasonable police officer considering the extremely dangerous situation of a suspect with a weapon and physical altercation in progress would conclude the use of deadly force was justified.

Other circuits have similar rulings to *Parks*. In *Boyd v. Baeppler,* 214 F.3d 594 (6th Cir. 2000), police officers responded to a call of a man in the area with a gun who reportedly fired shots. They saw a man matching the suspect's description who continued to flee. The officers believed he had a gun but did not see or hear the suspect fire a shot. *Id.* at 597-99. In finding the officers were entitled to qualified immunity, the court stated:

> [U]nder *Graham,* we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite

> different to someone facing a possible assailant than to someone analyzing the question at leisure.

Id. at 602 (citing *Smith v. Freland,* 954 F.2d 343, 347 (6th Cir. 1992) and *Graham v. Connor,* 490 U.S. 386, 396-97 (1989)). See also *Harrell v. Decature County, Ga.,* 41 F.3d 1494 (11th Cir. 1995) (upholding qualified immunity where law enforcement officer shot and killed a felony suspect because the officer reasonably could have believed the suspect was reaching under the seat of the automobile for a weapon); *Carswell v. Borough of Homestead,* 381 F.3d 235 (3rd Cir. 2004) (finding qualified immunity when officer shot and killed suspect who was fleeing and the officer could see the suspect did not have a weapon); *Slattery v. Rizzo,* 939 F.2d 213 (4th Cir. 1991) (finding deadly force was justified where suspect in vehicle refused orders to raise his hands and officer perceived he was holding something); *Reese v. Anderson,* 926 F.2d 494 (5th Cir. 1991) (finding shooting a suspect when he was reaching for what the officer thought might be a weapon was reasonable).

Second, it is not clearly established a warning was feasible in this case. In *Tennessee v. Garner,* this Court found, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, *where feasible,* some warning has been given. 471 U.S. at 11-12 (emphasis added). See, *Carr v. Tangelo,* 338 F.3d 1259, 1269, n. 19 (11th Cir. 2003) (quoting *McLenagan v. Karnes,* 27 F.3d 1002, 107 (4th Cir. 1994) ("We decline, therefore, to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing – particularly where, as here, such a warning might easily have cost the officer his life."). There is no clear law requiring a warning in circumstances

such as this case, therefore the Eighth Circuit erred in finding a warning was feasible and clearly established. It is necessary for this Court to clarify its direction in *Garner* as to when a warning is feasible in deadly force cases.

Finally, no court has held a person has a right not to be seized if the force used poses a risk to a third party. As discussed above, the Eighth Circuit's ruling considering the risk of harm to a third party in use of force cases created a circuit split. Because the Eighth Circuit was the first court to make such a holding, it was not clearly established at the time of this incident.

The Eighth Circuit's decision denying qualified immunity was mistakenly based on general principals and departed from precedent. This decision creates confusion and conflict among the circuits and within the Eighth Circuit itself. The *Craighead* decision de-emphasizes the perspective of the police officer who must make the split-second decision whether to employ deadly force when a third party is in close proximity. Police officers are tasked with protecting the security of the community and preventing harm. Police officers need to know when the threat of harm is sufficiently severe and imminent to warrant the use of deadly force and how to make that assessment in the field when there is a third party nearby and in what circumstances a warning is required.

Additionally, the Eighth Circuit's decision in *Craighead* is ambiguous as to situations when deadly force is acceptable. Was deadly force not acceptable in this case because the court found the gun was pointed in the air? Was it because a third party was in close proximity? Would Officer Lee's actions have been reasonable if a warning was given? It is essential for this Court to hear this case to clear up these ambiguities and guide police officers as to the circumstances when deadly force is legal.

CONCLUSION

For the foregoing reasons, Amicus Curiae MPPOA LDF and LELS respectfully request the Petition for Writ of Certiorari be granted to ensure the proper use of deadly force in similar circumstances is clearly established.

Respectfully submitted,

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